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CHARLES ELMORE CROPLEY

No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1945

THOMAS MARTINO, PETITIONER

v.

MICHIGAN WINDOW CLEANING COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION AS AMICUS CURIAE

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This is an employee suit under Section 16 (b) of the Fair Labor Standards Act. It presents questions of statutory interpretation similar to those involved in *Roland Electrical Co.* v. *Walling*, this Term, No. 45, and *Boutell* v. *Walling*, this Term, No. 73. The Administrator agrees with the position of the employees that they (1) are engaged in occupations necessary to the production of goods for commerce within the coverage of the Act, and (2) are not "engaged in * * * [a] service establishment the greater part of

whose * * * servicing is in intrastate commerce" within the exemption provided by Section 13 (a) (2).

(1) Petitioner's activities are virtually indistinguishable from the work of the janitors and porters in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and in *Borden Co.* v. *Borella*, No. 688, 1944 Term. The only difference is that petitioners work in a number of factories instead of being assigned to a single building. This circumstance might be significant if the work were performed in plants where "no manufacturing is carried on" and were "many steps removed from the physical process of the production of goods." Cf. *10 East 40th St. Bldg.* v. *Callus*, No. 820, 1944 Term, slip op., pp. 3, 4. In this case, however, unlike the *Callus* case, the employees work in the buildings where goods are physically produced and their work, far from being remote from, is closely related to, this physical process. To differentiate between employees of the building performing such work and employees furnished for this purpose by an independent business "is to make too much turn on the accident of the division of the whole industrial process." Cf. *Callus* decision, p. 2.[1]

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[1] The device of contracting out the work appears to have been widely used in the building maintenance industry for the purpose of evading labor standards prescribed by union agreements. See Proceedings, Eighth General Convention of Building Service Employees International Union, May 6, 1940, pp. 60 et seq.

The close relationship of window cleaning to the production of goods is attested not only by common knowledge of the need of proper window lighting for efficiency and safety in production, but by the great emphasis placed upon adequate window lighting by authoritative sources on factory construction and maintenance. One such source points out that "good lighting will increase the quality of production * * *, will increase the effective hours spent on the job" by "elimination of eye strain and eye fatigue," "will increase morale" and "will increase the effectiveness of supervision." See editorial in *Factory Management and Maintenance*, March 1942 (vol. 100, no. 3, p. 101). Another authority asserts that "adequate" daylight, properly applied, is the "ideal light" and therefore "regular window cleaning should be a part of the routine of every establishment," so that dirt and dust which settle on windows and skylights do not decrease the natural light "below the level needed for safety and efficiency." See editorial in *National Safety News* (organ of the National Safety Council, Inc.), March 1940. The economic and industrial data discussed in petitioner's brief leave little doubt that the Sixth Circuit should not have found it "impossible * * * to entertain the concept" that window cleaning is necessary to the production of goods for commerce.

(2) The ruling that petitioners are excluded from the Act by virtue of Section 13 (a) (2), we submit, is likewise erroneous. As more fully developed in the Government's brief in the *Roland Electrical* case, that section was designed to exempt only establishments which cater to the local consuming public, like barber shops, filling stations and laundries. The cleaning of windows of General Motors' factories—a service essential to their successful maintenance and operation, does not even remotely resemble the "local retailing activities" contemplated by the exemption.[2] See *Phillips* v. *Walling*, 324 U. S. 490, 497.

As shown in the Government's brief in the *Roland Electrical* case, the Sixth Circuit stands virtually alone in its refusal to distinguish between personal and industrial services in applying the exemption. As there pointed out, a possible explanation of the Sixth Circuit's exceptional position is that it was first confronted with the issue in connection with a linen supply company which, while serving largely industrial and business firms, performed operations believed by the court to be indistinguishable from those of an ordinary laundry catering to private individuals. See *Lonas* v. *National Linen Service Corp.*, 136 F. 2d 433 (C. C.

[2] While there may be some window cleaning firms which specialize in residential trade, windows in homes are customarily washed by the housewife or domestic help.

A. 6), certiorari denied, 320 U. S. 785.[3] The court apparently placed considerable weight on the Census classification of linen supply companies and laundries as "Personal Services." See *id.* at 434. Whatever explanation there may be, however, of that decision, the exemption should certainly not be extended to exclude from the Act an enterprise whose normal function is the furnishing of industrial and business services and whose operations are in fact essential to the productive process.

The window washing enterprise supplies a definite "business service," very much like that of supplying watchmen. See *Walling* v. *Sondock*, 132 F. 2d 77 (C. C. A. 5), certiorari denied, 318 U. S. 772; *Walling* v. *Lum*, 7 Wage Hour Rept. 570 (S. D. Miss., 1944); *Walling* v. *Wattam*, 6 Wage Hour Rept. 1119 (W. D. Tenn., 1943); *Walling* v. *New Orleans Private Patrol*, 57 F. Supp. 143 (E. D. La.). Window cleaning services are not classified by the census as "personal services" but as "business services" along with "protective agencies" and "detective agencies," such as defendants in the *Sondock* and other cases, *supra*, "auctioneers' establishments" (held outside

[3] Ordinary laundries serving private individuals and families have generally been regarded as within the exemption because they resemble the typical "personal service" businesses, in particular, the "pants pressing" shop explicitly contemplated by the sponsors of the exemption. Linen supply companies, like the National Linen Service Corp., however, are in fact quite different from the little "pants presser."

the exemption in *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 255 (E. D. Ky.); *Walling* v. *Lincoln Loose Leaf Tobacco Warehouse Co.*, 6 Wage Hour Rept. 68 (E. D. Tenn., 1943); *Walling* v. *Home Loose Leaf Tobacco Warehouse Co.*, 51 F. Supp. 914 (E. D. Ky.)), "messenger services" (held outside the exemption in *Walling* v. *Allied Messenger Service*, 47 F. Supp. 773 (S. D. N. Y.)), "employment agencies" (held outside the exemption in *Yunker* v. *Abbye Employment Agency*, 32 N. Y. S. 2d 715 (Munic. Ct. N. Y., 1941)), "duplicating, addressing, mailing, and mailing list services" (see *Hanzel* v. *Hooven Letters*, 44 N. Y. S. 2d 398 (City Ct. N. Y., 1943)), etc.

Even if it be assumed that respondent is a "service establishment the greater part of whose * * * servicing is in intrastate commerce,"[4] petitioners are not "engaged *in*" such an establishment. See *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128, 138 (N. D. Calif.), reversed on other grounds, 137 F. 2d 742 (C. C. A. 9), certiorari denied, 320 U. S. 770; *Walling* v. *New Orleans Private Patrol, supra*, at 148; *Walling* v. *Lum, supra*. As pointed out in petitioner's brief (p. 21), they work in factories which are under con-

[4] But see the decisions holding that where an establishment engages primarily in activities necessary to the production of goods for interstate commerce, the greater part of its servicing is not "in intrastate commerce" within the meaning of the exemption. These cases are cited in the Government's brief in the *Roland Electrical* case, No. 45, this Term, p. 39, n.

tracts with respondent and they hardly ever see respondent's establishment. Thus, respondent fails to meet the further condition of Section 13 (a)(2)—that the employees be "engaged in" a service establishment, that is, as it has been put, that they work in a "distinct physical place of business" devoted to performing service. See *Phillips* v. *Walling, supra*, 324 U. S., at 496. It is not sufficient that the employee be engaged *by* a service enterprise; he must be engaged *in* a service establishment. As this Court recently pointed out, this exemption from remedial legislation must be "narrowly construed." *Phillips* v. *Walling, supra*, at 493. Respondent's business, far from being "plainly and unmistakably within [the] terms and spirit" of the exemption (*ibid.*), appears to be outside of both.

Respondent argues that the Administrator's Interpretative Bulletin is inconsistent with the contention that the industrial character of the customers of the establishment makes the exemption inapplicable. In support of this argument respondent (Br., p. 8) quotes from the original 1938 version of Interpretative Bulletin No. 6, par. 4, to the effect that the criterion is "the nature of the business conducted by the employer."[5] As is clear from the succeeding paragraphs of the same Bulletin, this phrase was

[5] This Bulletin is printed in Bureau of National Affairs (1940), *Wage Hour Manual*, p. 155.

used only to distinguish the employee test which controls as to matters of coverage under Sections 6 and 7. *Kirschbaum* v. *Walling*, *supra*. It does not exclude from consideration the character of the employer's customers, which is an important factor in determining the wholesale or retail "nature of the business conducted by the employer." The test was restated with greater clarity in a revision of the Bulletin in June 1941, when the phrase "nature of the establishment" replaced "nature of the business conducted by the employer." See Interpretative Bulletin No. 6, printed in the transcript of record in No. 45, R. 25.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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